SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CLERK

No. 73-578

In the Supreme Court of the United States

OCTOBER TERM, 1973

STANLEY YASSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The issue is whether petitioner's retrial, after a mistrial granted during his first trial, constituted double jeopardy.

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner and two co-defendants were convicted of the interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. 2312, and of conspiring, in violation of 18 U.S.C. 371, to violate 18 U.S.C. 1952 by traveling and causing travel in interstate commerce with intent to commit extortion in violation of state law. Petitioner was sentenced for study pursuant to 18 U.S.C. 4208(b). The court of appeals affirmed.

Petitioner contends here that his conviction constituted double jeopardy because of a mistrial granted

during his first trial. He had moved for the mistrial after the prosecutor, during his opening statement, said that the evidence would show that the motivation for the extortion involved the theft of nine other vehicles; the ground for the motion was that the indictment mentioned only one stolen vehicle. The motion was denied, and the prosecutor continued his statement by saying that theft of only three vehicles would actually be proven. After the government had presented six witnesses, the court ruled, on the basis of its subsequent research, that the mistrial would be granted unless the government was prepared to prove theft of all nine vehicles. When the government indicated that it was unprepared to do so, a mistrial was declared. The court of appeals correctly held that, because of inadvertent prosecutorial error, the mistrial was properly granted at the behest and for the benefit of petitioner and his co-defendants, and thus under *United States* v. *Jorn*, 400 U.S. 470, 485, a retrial was not barred (see Pet. App. 15-18). See also *Illinois* v. *Somerville*, 410 U.S. 458, 464: "A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

DOJ-1973-12